

AN AUSTRALIAN FENCE-SITTER'S READING OF HUSCROFT'S LIVING TREE CONCERNS

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Under the Finn Rules, as outlined in the introduction to this issue, I am asked to present Professor Huscroft's paper, it being understood that he is opposed to bills of rights, especially in light of his Canadian experience, and that I am an advocate for a mild statutory bill of rights regime in all Australian jurisdictions.

Our convenor James Allan is originally a Canadian who tells his contemporary Australian co-habitants that he revels living in a country not burdened with a Bill of Rights. He obviously has no immediate plans to move to the ACT or Victoria. He has posed two questions:

- Who wins under a bill of rights?
- How much harm is caused by the 'living tree' metaphor when interpreting a bill of rights?

AUSTRALIAN VALUES AND BILLS OF RIGHTS

One argument for a bill of rights is that it helps to uphold community values when those values are most at risk, though not necessarily when they are most contested. A bill of rights is a legislative or constitutional text which sets down individual entitlements especially against the State, such entitlements being consistent with principles which are derived from community values. When a society is facing new challenges and rapid change, a bill of rights may provide bright line solutions for judges and legislators trying to navigate the challenges of change, remaining true to those values. Chief Justice Murray Gleeson says, 'In the past, religion provided many of the common values by reference to which conflicts of rights or interest were resolved. Our law still reflects many Christian values.' Reflecting on the nature of a pluralist society, he comments:

By definition, that means that there is competition, not only when it comes to applying values, but also in identifying values. Everybody is aware that our society is rights-conscious. A rights-conscious society must also be values-conscious. If it is not, then we have no way of identifying those interests that are rights, or of resolving conflicts between them. Rights cannot work without values.¹

When asked about these remarks in a broad ranging, profile interview in 2006, Gleeson told the *Australian Financial Review*:

I don't think judges should allow idiosyncratic values to influence their reasoning process. I can't think of any examples in which I have self-consciously applied my own values except insofar as they are reflected in ... legal principles. But self

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¹ Murray Gleeson, 'Rights and Values' (Speech delivered at the Melbourne Catholic Lawyers Association, 18 June 2004).

analysis is a risky process. A judge's duty is to administer justice according to law and if you can't perform that task then you shouldn't be a judge.²

In his 2006 Australia Day Address, Prime Minister John Howard looked back on the first century of Australian nationhood and reflected on the balance we have achieved as a nation, encouraging 'individual achievement and self-reliance without sacrificing the common good', valuing our independence, chafing against bureaucracies that deny us choice and the capacity to shape our lives, while being 'determined not to let go of the Australian ethos of the fair go for all'. We are now a 'diverse society which practices tolerance and respect'. He set down his catalogue of Australian values:

- respect for the freedom and dignity of the individual
- a commitment to the rule of law
- the equality of men and women
- a spirit of egalitarianism that embraces tolerance, fair play and compassion for those in need.

Conceding our cultural diversity, he insisted that like most nations we have a dominant cultural pattern, and for us that pattern comprises Judeo-Christian ethics, the progressive spirit of the Enlightenment and the institutions and values of British political culture.

When addressing the Australian Parliament on 27 March 2006, British Prime Minister Tony Blair said:

We know the values we believe in: democracy and the rule of law, but also justice, the simple conviction that, given a fair go, human beings can better themselves and the world around them. These are the values that our two countries live by, and others would live by if they had the chance. But we believe in more than that. We believe that the changes happening in the world that make it more integrated, the globalisation that with unblinking speed reshapes our lives, are an opportunity as much as a risk. We are open societies. We feel enriched by diversity. We welcome dynamism and are tolerant of difference.³

All Australian schools are now required by the Commonwealth Government to display nine values for Australian schooling: care and compassion; doing your best; fair go; freedom; honesty and trustworthiness; integrity; respect; responsibility; understanding, tolerance and inclusion.

While Tony Blair came to office with a passionate commitment to enacting the UK *Human Rights Act 1998*, John Howard has remained implacably opposed to the introduction of a bill of rights in Australia. Whereas Blair thought community values could be enhanced by a statutory bill of rights, Howard thinks a bill of rights in any form is inimical to the maintenance of Australian values. In his 2006 Australia Day Address, Howard put a bill of rights off the legislative agenda for his remaining time as prime minister. He told the National Press Club that there was always the need to find 'the right balance between the legitimate interests of the community on the one hand and individual civil rights on the other. And inevitably this will be a matter for passionate debate.' He then launched a lengthy salvo against a bill of rights in any form:

² Marcus Priest, 'The Smiler', *The Australian Financial Review Magazine*, May 2006, 70.

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 27 March 2006, 4.

Some Australians have argued in recent times that the balance has moved too far. They want to shift it in the other direction, principally through a Bill of Rights. I believe this would be a big mistake for our democracy. A Bill of Rights would not materially increase the freedoms of Australian citizens. It will not make us more united, indeed I believe it would lessen our ability to manage and to resolve conflict in a free society. It would also take us further away from the type of civic culture we need to meet the challenges of today and tomorrow. No matter how skilfully crafted, a Bill of Rights always embodies the potential for misinterpretation, unintended consequences or accidental exclusion. History is replete with examples of where grand charters and lyric phrases have failed to protect the basic rights and freedoms of a nation's citizens.

The strength and vitality of Australian democracy rests on three great institutional pillars: our parliament with its tradition of robust debate; the rule of law upheld by an independent and admirably incorruptible judiciary; and a free and sceptical press of the sort that we politicians simply adore. I've called this trilogy in the past the real title deeds of our democracy, a political inheritance that has given us a record of stability and cohesion that is the envy of the world. I have never been persuaded by those who claim that the road to good government is via taking more and more decisions out of the hands of the people's elected representatives.

THE CONTEMPORARY SHORTFALL IN THE PROTECTION OF RIGHTS

In 1998, I published *Legislating Liberty* in which I opposed the introduction of a constitutional bill of rights for Australia. Conceding the shortfall for the protection of rights in our constitutional machinery, I suggested four means for making up the shortfall:⁴

- The passage of a statutory bill of rights similar to the *New Zealand Bill of Rights Act 1990*;
- A constitutional amendment guaranteeing non-discrimination against persons so that we could permanently fetter the Commonwealth parliament and government from discriminating against people on the basis of race, gender or sexual orientation;
- Continued access to the First Optional Protocol of the International Covenant on Civil and Political Rights (ICCPR) which provides for equal protection and a ban on arbitrary interference with privacy;
- A High Court open to the influence of international norms of human rights on statutory interpretation and development of the common law.

In the short term I suggested the creation of a Senate Committee for Rights and Freedoms which could complement and incorporate the existing Scrutiny of Bills Committee, the Regulations and Ordinance Committee and the Legal and Constitutional Committee by implementing a Commonwealth Charter of Espoused Rights and Freedoms as 'a precursor to a statutory bill of rights'.

I conceded that 'bipartisan intransigence by our federal politicians confronted with violations against unpopular, powerless minorities would remain a problem'. But I suggested, '[t]hat intransigence presents an even greater obstacle to a more entrenched proposal such as a statutory bill of rights or a constitutional bill of rights'.⁵

I suggested that we had two distinctive Australian safeguards against majoritarianism:

⁴ Frank Brennan, *Legislating Liberty* (1998) 178.

⁵ *Ibid* 185.

- A Senate in which the balance of power will be held by minor parties whose political niche, in part, is carved from the espousal of individual and minority rights;
- A judiciary shaping the common law and interpreting statutes while responding to international developments in human rights jurisprudence.

So what has changed in eight years? Even before considering the new challenge of balancing civil liberties and national security in the wake of terrorist attacks off shore and threats on shore, we need to acknowledge the profound changes that have occurred to our checks and balances:

- The government no longer takes any notice of procedures under the first optional protocol;
- The government now controls the Senate;
- The High Court has become isolated from other final courts of appeal. With the passage of the UK *Human Rights Act 1998*, even the UK courts (like the courts in the US, Canada, South Africa and New Zealand) now work within the template of a bill of rights when confronting new problems, seeking the balance between civil liberties and public security;
- In *Al-Kateb v Godwin*,⁶ the isolated High Court has found itself unable to interpret a statute so as to avoid the possibility of a stateless asylum seeker spending his life in detention without a court order or judicial supervision.

Days prior to his retirement from the High Court, Justice McHugh had cause to lament publicly the ‘tragic’ outcome in *Al Kateb*.⁷ He told law students:

Al Kateb highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened. While the power of the judicial arm of government to keep a check on government action that contravenes human rights is limited, the need for those with a legal education, like yourselves, to inform the political debate on issues concerning the legal protection of individual rights is paramount.⁸

In the past, I had suggested there was no point in any one State jurisdiction going it alone on a bill of rights and that we were better off waiting for a uniform bill of rights at the Commonwealth level.⁹ The ACT passed its *Human Rights Act* in 2004. The Victorian Parliament has now passed its *Charter of Human Rights and Responsibilities Act 2006* part of which will take effect on 1 January 2007, with the Act taking full effect on 1 January 2008. The Court of Appeal of the Supreme Court of Victoria will be well positioned to be the leading interpreter of human rights instruments in Australia, unless and until the High Court whets its appetite for granting special leave applications to interpret bills of rights provisions which presently are confined to two jurisdictions.

The terrorist threat combined with the tight discipline of the government parties and the unwillingness of the parliamentary Opposition to invest much political capital in protection

⁶ (2004) 219 CLR 562.

⁷ Justice McHugh was one of the majority in the 4-3 decision. He observed at 581: ‘As a result, tragic as the position of the appellant certainly is, his appeal must be dismissed.’

⁸ M McHugh, ‘The Need for Agitators — the Risk of Stagnation’ (Speech delivered at the Sydney University Law Society Public Forum, 12 October 2005).

⁹ Brennan, above n 4, 44

of minority rights in these uncertain times contribute added potency to the call from the community for a statutory bill of rights which can consolidate the checks and balances needed in a modern democracy.

The ACT and Victorian legislative measures generally recognise the rights set down in the ICCPR. The Victorian government claims that its Charter 'gives effect to the government's preferred model for protecting human rights, namely a parliamentary based model including a mechanism whereby legislation being introduced into Parliament is certified as compatible with the jurisdiction's human rights obligations.'¹⁰ When a bill is introduced by the government (as most substantive bills are) the compatibility statement will be the work of lawyers in the Attorney General's department who are charged with assessing compliance with the Charter. The Parliament's Scrutiny of Acts and Regulations Committee is then required to consider every bill and all statutory rules, reporting on their compatibility with human rights. The Parliament retains the power expressly to declare that legislation will have its full effect despite being incompatible with a section of the Charter.¹¹ The Member of Parliament introducing legislation with an override declaration must make a statement to Parliament 'explaining the exceptional circumstances that justify the inclusion of the override declaration'.¹² The effect of such a declaration is that the Supreme Court is precluded for five years from being able to interpret the legislative measure consistent with the human rights which are specified as being overridden.

Section 32 of the Victorian Charter provides, 'So far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.' Acts of Parliament which are incompatible with a human right are still valid. However once the Supreme Court issues a declaration of inconsistency or incompatibility, the Minister who administers the Act is required to provide a written response to parliament within six months. These various procedures before and after the passage of legislation are designed to ensure maximum public disclosure by Parliament of its attempts to have all legislation comply with the human rights set down in the Charter.

BILLS OF RIGHTS AND THE 'LIVING TREE' APPROACH TO INTERPRETATION

Victorian judges may be minded to adopt a 'living tree' approach to their interpretation of the Charter and to their task of ensuring that as far as possible they interpret all statutory provisions consistent with the Charter. In Canada, the 'living tree' approach to constitutional interpretation was originally adopted by judges anxious to ensure that the Dominion Parliament had the requisite legislative power needed by an emerging independent polity. But once that approach came to be applied to the interpretation of a bill of rights, the effect was to restrict the legislative power and to enhance the domain of judicial power.

Some 'living tree' advocates argue that it is the difficulty of legislative amendment of a bill of rights that warrants the 'living tree' approach. But, Huscroft observes, 'There is no reason why the difficulty in amending the Charter should be borne by those opposed to change rather than those who favour it.'¹³ Given that a statutory bill of rights might protect exactly the same rights as a constitutional bill of rights, there is no reason to give a broader scope to a right constitutionally entrenched than to a mere statutory right. The substance of rights should not depend on the form of the protection. If a living tree interpretation is justified for a constitutional bill of rights, so too for a statutory bill of rights.

¹⁰ Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2556.

¹¹ Section 31.

¹² Section 31(3).

¹³ Grant Huscroft, 'The Trouble with Living Tree Interpretation', (University of Queensland Seminar, August 2006), in this volume, 8.

James Allan has opined that the logical conclusion of the living tree approach is a bill of rights which, in effect, provides:

The duly elected, democratically chosen government shall be subject to whatever restrictions and limitations as are deemed reasonable and appropriate, from time to time, by a majority of judges of the highest court in the land.

Justice Scalia has urged the need for ruthless specificity in drafting bills of rights, avoiding terms such as 'due process' and 'equal protection' and specifying rights which are 'no more and no less than what is reflected in the laws and practices of the current society'.

Inevitably those introducing a bill of rights argue that they are doing no more than affirming the rights and freedoms that already exist and are respected, heralding no real change. In the Victorian Legislative Council, the government minister introducing the Charter said:

The bill will benefit all Victorians by recording in one place the basic civil and political rights we all hold and expect government to observe. There are, of course, many laws operating at both commonwealth and state level that protect human rights and set out the responsibilities of governments, organisations and citizens in the general community. However, as these rights are included in a variety of places they are often hard to find. In addition, there are gaps in the existing legal protection of human rights.¹⁴

The speech was short on content about what the gaps were and how they would be filled.

Those like Ronald Dworkin who advocate a strong moral reading of the Constitution consistent with their own values and policy preferences claim that there are some universal constraints on any living tree interpretation. Any interpretation must be 'consistent in principle with the structural design of the Constitution as a whole'. Dworkin and Scalia would agree that you cannot interpret the equal protection clause of the US Constitution to require collective ownership of productive resources. Dworkin argues that such a finding would not fit American history or practice, or the rest of the Constitution. Scalia would say the same of the Supreme Court's recent jurisprudence on abortion and same sex relationships.

What are the constraints of living tree interpretations? Under the living tree approach, does the Constitution simply mean what the judges say it means? Huscroft dismisses Dworkin's reliance on judicial good faith or Aileen Kavanagh's hope that judges will make the right decision, 'resolving the issue before the court in a just manner' regardless of popularity or political consequences so as to attract and maintain 'respect and honour' especially from foreign jurists and academics.

Amongst the advocates for the living tree approach, Huscroft finds no coherent, self-imposed judicial constraints, whether the bill of rights be constitutional or statutory, other than the judge's own comfort zone, self-perception of her role, and inherent humility.

He then asks whether there are any extra-judicial constraints. Could judicial discretion be constrained by judicious drafting of the bill of rights by the legislature and their legal advisers? He thinks 'attempts to lock in particular conceptions of particular rights at the drafting stage are doomed to fail'. A case in point is the Canadian jurisprudence on Section 7 of the *Canadian Charter of Human Rights and Freedoms 1982* which was drafted to avoid the wholesale importation of substantive due process from the United States. The drafters

¹⁴ Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2554.

were specific in permitting deprivation of life, liberty and security only in accordance with 'the principles of fundamental justice'. They thought that fundamental justice would include procedural due process but exclude substantive due process. Had the drafters used the more familiar common law term 'natural justice', they might have avoided the judicial over-reach. Judicial over-reach was, in part, justified by some judges who thought that the drafters were committed to something more than natural justice, though less than full-blown substantive due process.

The Canadian experience shows that a fundamental change in the intended meaning of a provision is possible even within a very short time after the passage of a bill of rights. Even when the result and reasoning should be manifestly clear, as when the Canadian Charter excludes economic and social rights, the living tree proponents are willing to rework the meaning of a provision such as section 7 so as to recognise those rights that deserve protection and not just those that are granted protection under the Charter. The more diffident living tree proponents when confronted with a deserving case are not prepared to shut the door on a proposed interpretation. They leave open the possibility that 'one day (the provision) may be interpreted' to include the wish list of the unsuccessful litigant, and so they 'leave open the possibility' that a new right will be made out at some point in the future.

This living tree approach then causes increased uncertainty for citizens other than those who are agitating for the new right. The Canadian Supreme Court applied the living tree approach to the interpretation of Section 91(26) of the *Constitution Act 1867* whereby the parliament has power to make laws in respect of 'marriage and divorce'. It was able to give an Advisory Opinion approving a proposed Bill redefining marriage as the 'lawful union of two persons to the exclusion of all others'. It was then not in a position to give an unequivocal answer to those religious authorities wanting to know if they could restrict the religious celebration of state recognised marriages to unions between one man and one woman. The Court was prepared only to state that compulsory recognition of same sex marriage would 'almost certainly' run afoul the Charter's guarantee of freedom of religion. Huscroft expects that religious freedom will be made to give way 'not all at once, but incrementally', dying 'a death of a thousand small cuts rather than one fatal blow.' The winners will be same sex couples of a secularist mindset, and the losers will be religious folk who would like to have their church marriages recognised by the State.

Given the lack of judicial and extra-judicial constraints, Huscroft wonders whether the problem can be resolved by the enactment of a statutory rather than constitutionally entrenched bill of rights. Once again he finds no comfort here. It is difficult to amend or repeal even ordinary legislation. Commentators like me have long espoused the ping pong theory: that a statutory bill of rights sets up a game to and fro whereby the legislature and judiciary can play out their differences, rather than the judiciary having the capacity to deliver an unreturnable ace. Huscroft finds any such 'dialogue theory' unsatisfying and mischievous because 'the relationship of courts and legislators is hierarchical'. *De facto*, judges have the last word whether or not the bill of rights is statutory or constitutionally entrenched. A statutory bill 'simply precludes the *de jure* finality' of any judicial decision.

In the ACT, Chief Justice Higgins in *SI bhnf CC v KS bhnf IS*¹⁵ has shown how the living tree approach to a statutory bill of rights can result in the statute meaning just what the judge wants it to mean. Section 30(1) of the *Human Rights Act 2004 (ACT)* provides: 'In *working out the meaning of a Territory law*, an interpretation that is consistent with *human rights* is as far as possible to be preferred.' Section 30(3) provides:

In this section:
working out the meaning of a Territory law means—

¹⁵ [2005] ACTSC 125 (2 December 2005).

- (a) resolving an ambiguous or obscure provision of the law; or
- (b) confirming or displacing the apparent meaning of the law; or
- (c) finding the meaning of the law when its apparent meaning leads to a result that is manifestly absurd or is unreasonable; or
- (d) finding the meaning of the law in any other case.

In a dispute involving two minors, a magistrate had issued an *ex parte*, interim, personal protection order requiring the appellant to keep away from the other minor.

The court had to consider the application of section 51A(3)(b) of the *Domestic Violence And Protection Orders Act 2001* (DVPO) which provides: 'The interim order becomes a final order against the *respondent* if the *respondent* does not return the *endorsement copy* to the Magistrates Court at least 7 days before the return date for the application for the final order.' On its face, the protection order became final when neither the appellant nor his mother who had been appointed his litigation guardian took any action. Chief Justice Higgins had to 'work out the meaning' of this legislative provision. Having considered the rights set down not just in the *Human Rights Act 2004*, but also those rights in Articles 14 and 24 of the ICCPR, and *Magna Carta*, he concluded:

It would be incompatible with those rights if the DVPO Act and regulations were to be interpreted as permitting a final order, of whatever duration or, even, an interim order, save as mandated by an urgent need for personal protection of the applicant, without the child respondent to the application for it being represented by a litigation guardian and given a proper opportunity to be heard.

He concluded:

It is, therefore, apparent that the DVPO Act and Regulations, to be *Human Rights Act* compliant, as the Attorney-General has certified them to be, can only have been intended to be interpreted as I have determined above.

Section 51 of the DPVO Act is a valid law of the ACT legislature. It just does not mean what it says. An interim order becomes final only once the recipient of the order has been given a proper opportunity to be heard, and no court could be satisfied that such an opportunity was provided if the recipient simply failed to return a document or to appear within seven days.

BILLS OF RIGHTS IN AN ERA OF TERRORISM

After the Council of Australian Governments Meeting in September 2005, Prime Minister John Howard announced a new raft of anti-terrorism measures which required the co-operation of the states and territories. The Australian government was convinced of the need for the power to impose preventative detention on terror suspects for up to fourteen days without arrest, charge or trial. The government conceded that detention in these circumstances for more than 48 hours would be constitutionally suspect at the Commonwealth level as protracted detention could be classed as a penalty which should be imposed only by one able to exercise the judicial power of the Commonwealth. The states and territories are not subject to any such constitutional constraint. The Commonwealth obtained agreement from the States and Territories to pass complementary legislation.

The ACT Chief Minister, Jon Stanhope, sought advice from the ACT Human Rights and Discrimination Commissioner, Dr Helen Watchirs. She advised that such detention would be contrary to the *Human Rights Act 2004* (ACT) which provides a general

prohibition on arbitrary detention, specifying that anyone detained 'is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful'.¹⁶ She advised that 'the period of 14 days detention is too long and an alternative should be considered, such as lesser periods that may be renewed, but all of which at least are subject to judicial authorisation or review'.¹⁷ For these reasons, she did not consider that a breach of the right to liberty and security would be proportionate. She thought that the restrictions on liberty were not within reasonable limits which could be demonstrably justified within a free and democratic society.¹⁸ A month later, Jon Stanhope received legal advice from prominent legal academics that the Commonwealth's proposed regime for preventative detention orders 'breaches international human rights standards'.¹⁹ The ACT Human Rights Commissioner then advised that the enactment of ACT legislation to mirror the Commonwealth's *Anti-Terrorism Bill 2005* 'would contravene the *Human Rights Act 2004* (ACT)'. She did concede that 'In all instances the central question is whether the means suggested are proportionate to the legitimate objective of protecting the Australian community from the risk of terrorism, which is difficult to assess without specific briefing on national security issues'.²⁰ Nonetheless she was convinced that the Commonwealth's main accountability mechanisms for the detention regime were 'not adequate to fully protect human rights' and that any ACT mirroring legislation 'allowing detention for preventative detention without charge, with limited access to a lawyer and circumscribed judicial review is contrary to the right to liberty'. Having reviewed the Commonwealth provisions, she concluded, 'For these reasons I do not consider it likely that the breach of the right to liberty... would be proportionate'. She expressed the hope that the legislation could be made 'more human rights compliant' with more community consultation.

In May 2006, the ACT Legislature passed the *Terrorism (Extraordinary Temporary Powers) Act*. Jon Stanhope provided the necessary compatibility statement having obtained legal advice from the ACT Human Rights Office. He then tabled the explanatory memorandum on the bill noting:

The advice did note possible arbitrary interference with some human rights.

It noted that detention under preventative detention orders may be arbitrary (s 18 HRA) as a consequence of the duration of detention up to 14 days, and the incommunicado nature of detention. It also suggested that interference with the right to privacy may be arbitrary (s 12 HRA) as a consequence of the way in which a person would be detained and held in custody under a preventative detention order and the special powers allowing preventative and investigative authorisations.

However, it concluded that these interferences are likely to be 'reasonable limits' that can be 'demonstrably justified in a free and democratic society' for the purposes of s 28 of the HRA on the basis that:

- The obligation to respond to the threat of terrorism, including through legislative means, is an important and significant objective;
- The restrictions on rights are reasonable and necessary, taking into account the importance of achieving consistency within a national regime; and

¹⁶ Section 18(6).

¹⁷ ACT Human Rights Office, Advice to Jon Stanhope, 19 September 2005.

¹⁸ *Human Rights Act 2004* (ACT) s 28.

¹⁹ Advice of Professor Andrew Byrnes, Hilary Charlesworth and Gabrielle McKinnon to Jon Stanhope, 18 October 2005.

²⁰ ACT Human Rights Office, Advice to Jon Stanhope, 19 October 2005.

- The bill incorporates extensive safeguards, which, in the context of a national regime, represent the least restrictive options available.

The ACT's legislation complied with the Commonwealth's template with only two exceptions. The Commonwealth Attorney General Philip Ruddock has threatened to override the ACT provisions which preclude preventative detention of persons aged between 16 and 18 years. The Commonwealth wanted the states and territories to permit detention of terrorist suspects over 16 years of age. The Commonwealth is also concerned about the higher threshold of evidence required under the ACT law before preventative detention can be imposed.

Without access to national security briefings, legal advisers and state or territory politicians are not able realistically to assess whether restrictions on liberty are within reasonable limits that can be demonstrably justified in a free and democratic society. If the legislators in a bill of rights jurisdiction concede that the need for national consistency is a relevant criterion in determining reasonable limits on rights, those rights will enjoy no more privileged protection than in those jurisdictions without a bill of rights.

The ACT anti-terrorism laws are little more protective of civil liberties than the laws of the Commonwealth and other States. The minor variations may be traceable to the need for preliminary dialogue between the legislature and executive before the passage of such contested security laws. But the ACT Human Rights Office has not been any better situated than the recent Sheller Review in affecting the outcome of anti-terrorist legislation, given that each is denied access to national security briefings so as to assess the threat. The UK Anti-Terrorism laws are not markedly better in the protection of civil liberties than the Commonwealth laws, even though Westminster is constrained by a Human Rights Act and the Commonwealth Parliament is not. Statutory bills of rights have counted for little in reigning in the executive's desire to have Parliament legislate tight constraints on civil liberties for terror suspects. When the Victorian Charter was introduced to Parliament, the minister was insistent that the bill would 'not stop the government from taking strong action to protect the community from terrorist threats or criminal activity'.²¹

BILLS OF RIGHTS AND CONTESTED MORAL ISSUES

Huscroft expects that judges will exercise greater de facto power under an Australian bill of rights than its statutory form and inherent limitations might suggest.²² He has 'no doubt that proponents of an Australian bill of rights are counting on them doing so'. The approach of the Victorian Human Rights Consultation Committee to family rights for same sex couples is a case in point.

Section 8 (3) of the Victorian Charter contains the tell-tale broad legislative statement of equal protection:

Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

It remains to be seen if this equal protection clause might be used as a vehicle to attempt a change of the law and policy on the availability of assisted reproduction of children by family units other than those headed by one adult male and one adult female. In the past,

²¹ Victoria, *Parliamentary Debates*, Legislative Council, 19 July 2006, 2555.

²² Grant Huscroft, 'The Trouble with Living Tree Interpretation', (University of Queensland Seminar, August 2006), in this volume, 22.

state policy has given some acknowledgement of the natural right of a child to have, know and be nurtured by their natural parents. Section 17(1) of the Victorian Charter provides, 'Families are the fundamental group unit of society and are entitled to be protected by society and the State'. This wording departs from the ICCPR which states that the family is the '*natural and fundamental group unit of society*'. Legislative drafters of bills of rights now regard the descriptor 'natural' as otiose. There is no such thing as a natural group unit any more. We have only fundamental group units. Presumably a two man or two woman unit could now be described as a fundamental group unit, a family.

Article 12 of the UK *Human Rights Act 1998* states: 'Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.' This provision echoes Article 23(2) of the ICCPR which recognises 'the right of men and women of marriageable age to marry and to found a family'. In the Convention, the right is stated in the singular. One has the right to marry and (then or in the process) to found a family. The Victorian Consultation Committee took the view that there are two separate rights – the right to marry, which is a Commonwealth concern under s 51 (xxi) of the Commonwealth Constitution, and the right to found a family which might be exercised by single persons or by couples who do not have the right to marry each other – a right which might be recognised at State level regardless of the Commonwealth law on marriage. The Committee considered that 'the right to found a family' (not as an incident of marriage, but as a separate free standing right) 'is an essential civil and political right that people would expect to see in a human rights instrument'.²³

The Committee said it was only because the Victorian Law Reform Commission was undertaking a detailed reference on assisted reproduction and adoption that the committee did not want to pre-empt the findings. They urged that the matter be re-visited in four years time when the Charter is reviewed. It would then be appropriate for elected parliamentarians to consider whether a new legislative provision should be enacted permitting judges to extend the right to found a family to all persons seeking state assistance with the creation of children who would then not have the opportunity to know and be nurtured, nor perhaps even to have, a natural father and a natural mother.

There may not be a need to wait four years. By creating two rights out of one, judges of the living tree school could regard themselves as free to recognise the right to non-discriminatory state assisted ART for the creation of children by same sex couples. This could be done without any consideration of the 'natural right' of a child to be created with a known biological mother and a known biological father. It is worth noting that the House of Lords, in the context of a custody dispute, has recently reaffirmed that the gestational, biological and psychological relationship between a mother and child is 'undoubtedly an important and significant factor in determining what will be best' for a child 'now and in the future'.²⁴

CONCLUSION

Prior to the present threat of terrorism, those Australians committed to the values espoused by Prime Minister Howard in his 2006 Australia Day Address could not accept any government's plea 'Trust us' in setting the balance right between liberty and security. Confronting terrorism, we need to enhance the checks and balances so that government, police and security services will remain trustworthy. Government alone, unchecked and unfettered, sometimes makes mistakes, especially in the wake of populist sentiment and when the focus falls on an unpopular minority of outsiders. To any government pleading,

²³ The Report of the Human Rights Consultation Committee, Parliament of Victoria, *Rights, Responsibilities and Respect* (2005) 42.

²⁴ *Re G (children) (FC)* [2006] UKHL 43 at [44] (Baroness Hale of Richmond).

'Trust us', the people are entitled to reply, 'Maintain that trust with appropriate checks and balances.' Many citizens now see a case for a bill of rights, as well as a free press.

A bill of rights, whether statutory or constitutionally entrenched, does little for most citizens most of the time because they do not run foul of the law enforcers nor of the government which is popularly elected attending to their needs for security and economic well being. Anti-terrorism laws too widely drawn are unlikely to have an adverse impact on the person of Anglo-Celtic appearance going about his or her daily affairs. They are far more likely to have an adverse impact on the person of Middle Eastern appearance or on the Muslim person wearing distinctive head dress. Migration detention laws too widely drawn are unlikely to have an impact on the citizen who is mentally well and able to explain himself.

Our problem is not just that we are without a national bill of rights. The general populace is oblivious of laws which abandon traditional safeguards including the provision that persons be not taken into lengthy detention by the state without a court order and without court supervision.

Many of our elected politicians are convinced that unelected judges are bad news when it comes to detention of persons suspected of being unlawful non-citizens. The *Migration Act* imposes an obligation on authorised migration officers to detain any person who is 'reasonably suspected' of being an unlawful non-citizen.²⁵ Persons once detained are not brought before any court. The Commonwealth Ombudsman recently reported the case of Mr T. An Australian citizen since 1989, he has been taken into immigration detention three times for a total of 253 days. He was held in detention from 19-23 March 1999, 17 January – 16 September 2003, and a month later from 17-22 October 2003. The ombudsman concluded, 'Mr T's case is disturbing as it involved the detention on three occasions of an Australian citizen. Mr T's mental illness, his homelessness and lack of an effective personal social support structure, his poor English language skills and his ethnic background were all factors that contributed to the decisions taken by DIMA officers to detain and continue to detain him as a suspected unlawful non-citizen'. The Ombudsman listed the following systemic failures in the department which has the power to remove anyone off the streets and put them in detention should an ill-trained officer of the department suspect someone who is schizophrenic of being a non-citizen:

- a negative organisational culture;
- a poor understanding of the requirements and implications of the *Migration Act 1958*;
- a rigid application of policies and procedures that do not adequately accommodate the special needs of persons suffering from mental illness;
- poor training of DIMA officers, including the management of mental health, language, cultural and ethnic issues;
- an abrogation of duty of care responsibilities;
- poor instructions, procedures and practices relating to the identification of detainees, including the failure to use fingerprints as a means of identification;
- information systems and database shortcomings;
- poor case management, including no effective review process, a failure to follow up on information and poor record keeping; and
- a lack of appropriate arrangements to facilitate the gathering of important information that may assist in the identification of a detainee from Immigration Detention Centre (IDC) service providers.

²⁵ *Migration Act 1958* (Cth) s 189.

If there were a Commonwealth Bill of Rights, it would presumably contain a clause similar to section 18(6) of the ACT *Human Rights Act 2004* (ACT) which provides that 'Anyone who is deprived of liberty by arrest or detention is entitled to apply to a court so that the court can decide, without delay, the lawfulness of the detention and order the person's release if the detention is not lawful'.²⁶ Mr. T would still need someone to assist him in his lamentable state so that he might gain access to a court. His case could then be considered in open court, and a department with a negative organisational culture would be more likely to be called to account more promptly. Hallowed national values would be more evident in a polity that ensured Mr T access to a court at the time of his detention rather than access to the Ombudsman years after his release once there has been a political purge on a government department. Perhaps a future bill of rights should provide that a person detained on suspicion of being an unlawful non-citizen is entitled to a statement of grounds for the official's suspicion, such a statement of grounds being required to be produced to a magistrate for review within a prescribed period. In these matters, it is always a question of how far are we prepared to go ensuring justice for all, thereby witnessing to those cherished Australian values listed in the Great Hall of Parliament this last Australia Day.

For us Australians, whether or not we have a national bill of rights, the question will always be how to nurture a deep rooted culture of respect for human rights among governors and the governed. It will be increasingly difficult for the jurisprudentially and geographically isolated Australia to strike the right balance, maintaining respect for the freedom and dignity of the individual, a commitment to the rule of law, and a spirit of egalitarianism that embraces tolerance, fair play and compassion for those in need. As even the British have found, a statutory bill of rights will probably be the needed fourth institutional pillar on which will rest an Australian democracy true to Australian values. But judges will need to refrain from the Alice in Wonderland temptation of declaring that the law, being deemed to be human rights compliant, is what they want it to be, regardless of what Parliament has said.

²⁶ See also s 21(7), *Charter of Human Rights and Responsibilities Act 2006* (Vic).

